

## **INITIAL STATEMENT OF REASONS**

### **1. §1896. Purpose of Subchapter**

#### **SPECIFIC PURPOSE OF THE REGULATION**

Using plain English, the proposed regulation states in broad terms the intended purpose of the subchapter.

#### **NECESSITY**

The necessity of this regulation is to give the reader a clear understanding right at the beginning of the subchapter exactly what is addressed in more detail in the balance of the subchapter. That way, if the reader is seeking certain information, they can quickly determine the applicability of this subchapter.

#### **REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT**

This regulation does not mandate any specific actions or procedures or specific technologies or equipment.

#### **TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation.

#### **ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES**

The DGS considered modifying the current regulations. However the modifications that would need to be made were so extensive, that alternative was rejected in favor of replacing the current regulations in their entirety with new regulations. No other alternatives were presented to or considered by the DGS.

#### **ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS**

The DGS has not identified any adverse impact or alternatives that would lessen any adverse impact on small businesses.

#### **EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS**

The proposed regulation would not have any significant adverse economic impact on any business since it only describes in broad terms the content of the subchapter.

EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS  
– FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR  
THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable

**2. §1896.2. Authority**

SPECIFIC PURPOSE OF THE REGULATION

Even though the statute clearly establishes the DGS's authority to establish regulations to implement the Small Business Procurement and Contract Act, repeating the authority within the regulations themselves, setting a firm foundation for the regulations, should strengthen the Small Business program.

In order to verify the eligibility of a business for small business certification, the DGS must oftentimes rely on information gathered from sources other than the applicant (the business that has applied for certification). The public has a right to know that the DGS will seek access to information public agencies have in their possession that may be useful in this regard.

NECESSITY

Sometimes businesses that are not eligible for small business certification apply to obtain such certification, and fail to disclose information that would render them ineligible. In order to preserve the integrity of the small business program, the DGS must have the ability to seek information from reliable public sources that would corroborate or refute information contained in the application of a business for small business certification.

REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC  
TECHNOLOGIES OR EQUIPMENT

This regulation does not mandate any specific actions or procedures or specific technologies or equipment.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation. The DGS did however make its determination as a direct result of small business community comments, staff experience and comments, and written appeal case decisions.

## ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

No other alternatives were presented to or considered by the DGS.

## ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The DGS has not identified any adverse impact or alternatives that would lessen any adverse impact on small businesses.

## EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulations would not have any significant adverse economic impact on any business since the proposal only clarifies and simplifies the rules governing the existing small business program, and clearly describes the DGS's authority to implement the provisions of the Act and obtain information made available to it by other public agencies.

## EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable

### **3. §1896.4. Definitions**

#### SPECIFIC PURPOSE OF THE REGULATION

The current regulations list many of the terms used by the Department of General Services (DGS) in the small business program, however as currently written, many are vague, difficult for small businesses to understand, and open to numerous interpretations. As a result, this regulation clearly defines in plain English, the common terms used by the DGS to administer the small business certification program.

#### NECESSITY

Government Code (GC) §14837 establishes the definition for a California small business. This definition is used by the DGS to determine eligibility for small business certification. Many of the terms used in the definition are not defined in the GC; however most have previously been defined in Section 1896, Title 2, Subchapter 8 of the California Code of Regulations (CCR).

The current regulation is too vague for a small business to have a clear understanding of the terminology used for the small business certification program. As a result, it is reasonably necessary for the DGS to clarify the definitions in a manner such that the small business community can understand the definitions without the aid of an attorney.

#### REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT

This regulation does not mandate any specific actions or procedures or specific technologies or equipment.

#### TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation. The DGS did however make its determination as a direct result of small business community comments, staff comments and written appeal case decisions by the DGS Hearing Officer. In all cases, there has been the overall theme that the current regulations are cumbersome, vague and difficult to interpret.

#### ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

No other alternatives were presented to or considered by the DGS. Clear definitions of the terms listed in Section 1896 are necessary for businesses desiring to apply for a California small business certification.

#### ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The DGS has not identified any adverse impact or alternatives that would lessen any adverse impact on small businesses.

#### EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulations would not have any significant adverse economic impact on any business since the proposal only clarifies and simplifies the rules governing the existing small business program.

#### EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable

#### **4. §1896.6. Application of the Small Business and Non-Small Business Subcontractor Preferences**

##### **SPECIFIC PURPOSE OF THE REGULATION**

The current regulations do not adequately explain the conditions under which a certified small business is eligible for the five percent bid evaluation preference nor explain how the non-small business subcontracting preference, created in Chapter 882, Statutes of 2001 (AB 1084, Wesson), would be applied. The proposed regulation clearly delineates the conditions that must exist before a certified small business is granted the five percent small business preference on a bid evaluation. The proposed regulation clearly delineates the conditions that must exist before a non-small business is granted the five percent non-small business subcontracting preference on a bid evaluation

##### **NECESSITY**

All businesses competing for state contracts must know and understand the conditions under which the dollar amount of a competitor's bid will be modified by the state during a bid evaluation, as occurs when the five percent small business preference or the non-small business subcontracting preference is applied.

##### **REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT**

It is reasonable and necessary to inform businesses in clear and concise terminology what specific steps a certified small business must take in order to be granted the five-percent bid evaluation preference or the steps a non-small business must take to be granted the five-percent non-small business subcontracting preference. Unless state agencies are informed that a bidder is a certified small business or a non-small business that is subcontracting to certified small businesses, they cannot know to apply the preference. Also, because the state cannot accept bids that are not submitted on time, or do not meet its requirements, the preference will be applied only to those bids that are responsive to the technical specifications, submitted on time, and submitted by responsible bidders. In addition, this regulation notes that a certified small business or non-small business that is subcontracting to certified small business must also state in its bid to the state that they are certified and/or requesting the small business or non-small business subcontracting preference. These are very basic elements of the competitive process, and not desktop procedures.

##### **TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation. The DGS did however make its determination as a direct result of small business community comments, staff comments and state agency practices that are supported by the current regulations but are not clearly established.

## ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The only alternative considered by the DGS was to not address this at all in regulation, but to rely instead on information contained in the terms and conditions of each and every solicitation. Instead, it was determined that including this regulation is beneficial to all parties participating in state solicitations.

## ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The DGS has not identified any adverse impact or any alternatives that would lessen any adverse impact. Quite the opposite. The DGS has continued a precedent established in the current regulations; that of permitting a business to claim and be eligible for the five percent small business preference so long as they submit a completed application to the DGS by 5:00pm on the date bids are due. The non-small business subcontracting preference only expands the opportunities available to small businesses. The other conditions set forth in this regulation are basic tenets of public contracting – a bid must be complete, responsive to the requirements of the solicitation, and it must be offered by a responsible bidder.

## EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulations would not have any significant adverse economic impact on any business since the proposal only clarifies the rules governing the existing small business program.

## EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable

## **5. §1896.8 Computing the Small Business and the Non-Small Business Subcontractor Preferences**

### SPECIFIC PURPOSE OF THE REGULATION

The current regulations are cumbersome and difficult for a business to interpret how the small business preference is applied to individual bids.

In addition, there are no current regulations that describe how the new (Chapter 882, Statutes of 2001 [AB 1084, Wesson]) non-small business subcontractor preference will be computed. Nor are their current regulations that describe how a small business or non-small business subcontractor preference is to be applied on those bid evaluations where factors other than

price are considered in determining the lowest bidder, provisions that were added to the Government Code in the same legislation.

These regulations clarify how the calculations are made, and also include descriptions of how the new preferences are computed.

Rather than describe how the preferences will be applied to different types of **contracts** (as the current regulation does), this regulation describes how the preferences will be applied to different types of **bid evaluation methods**, regardless of what the contract is for.

In addition, the regulation requires state agencies to include in their solicitation a description of how the preference will be computed and applied when they are using a bid evaluation method that weighs factors other than price, together in a formula with price, to determine the winning bidder.

### NECESSITY

The current regulations do not adequately describe how the small business preference will be applied. As a result, it is reasonably necessary for the DGS to clearly state how state agencies will apply the small business preference when an eligible business has requested it apply to their bid.

### REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT

This regulation mandates that the small business or non-small business subcontractor preferences be computed by state agencies using two different methodologies, depending on whether or not the bid is being evaluated solely on the prices submitted, or if an evaluation technique is being used whereby price is considered together with factors other than price in order to determine the low bidder. When a state agency is using the latter type of evaluation, it is necessary to mandate in the regulations that the state agency determine in advance how to apply the preference so that the full five percent certified small businesses or qualified non-small business subcontractor preferences are not diluted. It also necessary for state agencies to inform bidders in the solicitation exactly how the evaluation will be conducted. Not only is this a fairness issue – making sure the full five percent preference is applied – it is also common sense, and will lessen any confusion potential bidders may have about how the bids are to be evaluated. In addition, this mandate is intended to bring some consistency to the solicitation process, even though state agencies may use different methods of bid evaluation.

### TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation. The DGS did however make its determination as a direct result of small business community comments, staff comments and

state agency practices that are supported by the current regulations but are not clearly established.

#### ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The DGS considered using language similar to that used in the current regulations addressing the application of the small business preference. While they are discouraged from doing so by policy, the current regulations permit state agencies to use a bid evaluation method that has the effect of diluting the preference so that it actually may end up being less than the full five percent certified small businesses are entitled to. This alternative was rejected in favor of the proposed regulation that assures certified small businesses will receive the full five percent preference no matter how the bid evaluation is conducted.

In addition, the current regulations impose an unreasonable eligibility standard on small businesses claiming the preference in solicitations for public works contracts. These standards do not exist in the proposed regulation.

#### ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed regulation actually broadens the application of the small business preference. So, rather than an adverse impact, they have a beneficial impact on certified small businesses.

#### EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

Businesses that are not certified small business may experience a small and insignificant adverse impact when these regulations are adopted. On solicitations that consider factors other than price, these businesses would no longer enjoy the competitive advantage they now receive when the five percent preference is diluted.

However, such an impact is necessary in order to apply the small business preference the way the Legislature and Governor intended, so that certified small businesses benefit from the full five percent preference and not a diluted percentage, as occurs under current regulations.

#### EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable



## **6. §1896.10. Substitution of a Small Business Subcontractor**

### SPECIFIC PURPOSE OF THE REGULATION

Chapter 882, Statutes of 2001 (AB 1084, Wesson) established a Non-Small Business Subcontractor preference. Businesses that are not certified as small businesses, and that claim and are awarded the non-small business subcontractor preference, need to clearly understand the requirements that would allow for substitution of small business subcontractor(s) after the contract has been awarded.

This regulation not only includes the requirements for substitution of small business subcontractors, but also includes the criteria the DGS proposes for state agencies to use to determine and verify that a non-small business is substituting a small business subcontractor in good faith.

### NECESSITY

Since Chapter 882, Statutes of 2001 (AB 1084, Wesson) is new law, the current regulations do not address the non-small business preference or the small business subcontracting substitution. This regulation is needed to implement and support the legislation.

### REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT

As the authorizing legislation was not specific in how it was to be implemented, this regulation does mandates the specific actions and/or procedures that state agencies and departments to implement Chapter 882, Statutes of 2001 (AB 1084, Wesson). This mandate sets policy for all state agencies and departments to follow. This standardizes the policy statewide and prevents unequal or muddled implementation of the law. This mandate also allows the business community to clearly understand the policies will be consistent throughout all state agencies and departments.

### TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation. The DGS did however make its determination as a direct result of staff understanding of the intent of the authorizing legislation.

### ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The DGS did not consider alternatives to the regulation as it is needed to comply with the intent of the authorizing legislation.

## ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed regulations would not have any significant adverse economic impact on any small business. Indeed they protect the interests of certified small businesses by assuring non-small businesses live up to their contractual commitments to subcontract with certified small businesses.

## EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulations would not have any significant adverse economic impact on any business.

## EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable

### **7. §1896.12. Eligibility for Certification as a Small Business**

#### SPECIFIC PURPOSE OF THE REGULATION

Businesses need to clearly understand the eligibility requirements for small business certification and microbusiness designation. While the small business certification eligibility requirements are in the current regulations, they are confusing, hard to understand, and located in the definitions, a place most readers would not consider looking. This regulation clarifies and simplifies the requirements, and locates them all in one regulation so they are easier to find and understand.

This regulation not only includes the eligibility requirements for small business certification and microbusiness designation, but also includes the criteria the DGS proposes to use to determine and verify that a business has met the eligibility requirements for small business certification and microbusiness designation. For the purpose of keeping all the eligibility requirements in one regulation, the Government Code § 14837 definition of a small business has been included as well.

Further, the regulation authorizes DGS to certify those businesses that have been certified by or on behalf of another governmental organization, so long as the eligibility standards are the same or more stringent than those specified in the Government Code.

#### NECESSITY

The current regulations list the small business eligibility requirements only in the definition. This makes it difficult for a business to easily identify the eligibility requirements. This

regulation is intended to separate the eligibility requirements from the definitions, and to explain them in greater detail so that they are more easily understood. It also implements the microbusiness designation established in Chapter 882, Statutes of 2001 (AB 1084, Wesson).

#### REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT

This regulation does not mandate any specific actions or procedures or specific technologies or equipment.

#### TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation, as the eligibility requirements are in the current regulations under Regulations 1896(l)(m) and (n). This regulation proposes to relocate the eligibility requirements and explain them in greater detail so that they can be more easily understood.

#### ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The DGS considered leaving the eligibility requirements in the definitions, but rejected that alternative in favor of autonomy and the greater detail provided in the proposed regulation.

#### ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed regulations would not have any significant adverse economic impact on any small business.

#### EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulations would not have any significant adverse economic impact on any business.

#### EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable

## **8. §1896.14. Responsibilities of the Small Business**

### **SPECIFIC PURPOSE OF THE REGULATION**

In the current regulations, there is a similar regulation, however it is entitled "Certification." Since this regulation addresses responsibilities of the business, we entitled it differently. The previous regulations required certified small businesses to notify the DGS of any changes in operation or ownership. The proposed regulations require this notice only when it may have an impact on the business's continuing eligibility as a certified small business.

This regulation is intended to provide businesses a clear understanding of exactly what is expected of them in order to obtain and retain certification as a small business.

### **NECESSITY**

The responsibilities of a business to adequately respond to DGS's inquiries or deficiency notices in a timely manner, and the consequences of not doing so, are not addressed in the current regulations. Businesses clearly need to understand exactly what is expected of them in order to become a certified small business, as well as what is expected of them during the time they are certified.

### **REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT**

This regulation mandates at a very high level, certain basic steps a business must take if they wish to be certified as a small business. This standardizes the process for all businesses, and assures the state receives the same material from all applicants. This will help to streamline and simplify the process for all applicants. In addition, this regulation mandates that businesses keep the state informed if their business status changes in such a way that it would affect their continued eligibility for small business certification. This is an important requirement in order to maintain the integrity of the certification program, and assures all suppliers that only those who continue to remain eligible for certification retain their certification. It would not be fair to competitors if a business retained a small business certification that made it eligible for a five percent bid evaluation preference, even if they were no longer eligible. Permitting that to occur would erode the public's confidence in the state acting as a responsible caretaker of their tax dollars.

### **TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation. The DGS did however make its determination as a direct result of small business community comments, staff comments and written appeal case decisions by the DGS Hearing Officer.

## ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

No other alternatives were presented to or considered by the DGS.

## ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

No alternatives were considered by the DGS that would lessen any adverse impact to small business. This regulation would have a beneficial impact on small businesses, as it describes their responsibilities in order to become a certified small business, as well as their on-going responsibility to keep the DGS informed. While this is addressed in current the regulation, the language is confusing and difficult to understand.

In addition to the responsibilities, the regulation also addresses the consequences of failure to adequately respond to DGS inquiries or deficiency notices in a timely manner, or to notify the DGS of a change in business operations that would affect their continued eligibility for certification as a small business. DGS can take as a result of a business's failure to adequately and timely respond to an inquiry or deficiency notification appear to be punitive in nature; they are necessary to preserve and protect the integrity of the small business program. In addition, these actions are supported in law. Moreover, any adverse impact to small business is mitigated by the due process provided through the appeals process included in this subchapter.

## EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulations provide a beneficial impact on business as they state clearly and concisely the responsibilities a business must meet in order to be certified as a small business, and the ongoing notification responsibilities of a certified small business. In addition, while there are significant consequences of failure to notify the DGS, those are mitigated by the appeals process included in another regulation in this subchapter.

## EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable

### **9. §1896.16. Certification by the Department**

#### SPECIFIC PURPOSE OF THE REGULATION

The regulation provides information regarding the time period businesses may be certified as a small business, without having to renew that certification. It also adds the time period that

the microbusiness designation may be applied, if applicable. In addition, the DGS, through this regulation, is lengthening the time period a business may be certified, from the current 3 years maximum to 3 years plus two additional years (at the DGS discretion).

In addition, businesses seeking certification as a small business should know and understand the sanctions that may be imposed should they furnish incorrect or incomplete information in order to obtain the certification, and be awarded one or more contracts as a result of that certification.

It is equally important businesses be aware of the sanctions that may be imposed for knowingly and intentionally fraudulently obtaining, retaining, or attempting to obtain or retain or aid another business to fraudulently obtain, retain, or attempt to obtain or retain certification as a small business.

### NECESSITY

It is reasonable, necessary, and obligatory for the DGS to advise businesses of the certification period, including notice of the potential for extensions of the 3-year certification period provided for in the current regulations.

It is equally important to advise businesses of the statutory sanctions that may be imposed by the DGS. Although these sanctions are in law, they are duplicated in the regulation so that they are included as part of the other operational components of the small business program.

### REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT

This regulation does not mandate any specific actions or procedures or specific technologies or equipment.

### TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation. This is not necessary in that the DGS is only clarifying in regulations what Government Code §§ 14842 and 14842.5 already enact.

### ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The DGS considered not including the sanctions since they are enumerated in statute. This alternative was rejected in favor of including the language of the statute so those prospective small businesses are more fully informed.

## ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

Including the possible sanctions in the regulation may appear to have an adverse impact on small businesses. But since the sanctions are already in statute their inclusion here does not impose a more stringent standard; their presence merely serves to inform.

## EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulations would not have any significant adverse economic impact on any business since the proposal is for clear clarification of current statute in the regulations.

## EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable

## **10. §1896.18. Appeal of Certification Denial, Decertification, or the Imposition of Sanctions**

### SPECIFIC PURPOSE OF THE REGULATION

The regulation describes how a business may appeal the denial by DGS of small business certification, or a notice from DGS of its intention to decertify and/or impose sanctions, including the grounds under which such appeals may be lodged. This regulation in particular is crucial to the integrity of the small business program, and it must be clearly understood by all.

### NECESSITY

There is the necessity to clearly establish the rules for an appeal process so that businesses fully understand their rights to an appeal should they be denied certification, have their certification revoked by the DGS, or sanctions imposed. It is important businesses are made aware of their “due process” rights, and understand them.

### REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT

This regulation, again at a very high level, specifies the process businesses must follow should they wish to appeal the department’s decision to deny them a small business certification, decertify them as a small business, or impose sanctions. In order to bring consistency to this aspect of the small certification process, certain basic rules must be specified in regulation (e.g. appeals must be filed by the date and time the department

specifies in its notice to the business, and shall be filed in writing, specifying the grounds on which the appeal is lodged). Without these basic rules, staff of the department and businesses themselves would not know if an actual appeal was considered lodged simply on the basis of a verbal statement.

#### TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation.

#### ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

No other alternatives were presented to or considered by the DGS. Businesses should be able to avail themselves of an appeals process when denied certification, or when decertified by the DGS, or when sanctions have been imposed.

#### ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The DGS has not identified any adverse impact or any alternatives that would lessen any adverse impact on small businesses.

#### EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulations would not have any significant adverse economic impact on any business.

#### EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable

### **11. §1896.20. Appeal Hearings**

#### SPECIFIC PURPOSE OF THE REGULATION

The current regulations provide for an informal hearing process. An established, reliable administrative hearing process would better serve both businesses and the state.

This regulation establishes an administrative appeals and hearing process presided over by an Administrative Law Judge (ALJ), and substantially in accordance with the rules under the



Administrative Procedure Act (APA) (Chapter 5 (commencing with § 11500) of Part 1 of Division 3 of Title 2 of the Government Code).

This regulation is intended to inform businesses that the hearing process shall be conducted in accordance with an established, mature and reliable administrative hearing process in which an ALJ is the ultimate decision-maker. In addition, this established process describes further appeal rights, should a business decide to appeal the ALJ's decision to a court of law.

#### NECESSITY

There is the necessity to clearly establish the rules for an appeal process so that businesses fully understand how the hearings will be conducted, who will conduct them and who will make the final decision on the appeal. This is especially important since the current appeals process is being changed by these regulations.

#### REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT

This regulation mandates that a specific hearing process be conducted for appeals lodged under Section 1896.16 of this regulation. The hearing process cited is a mature, proven process, also governed by regulations that have survived the public's scrutiny, and assures businesses they will be treated fairly.

#### TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation.

#### ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The DGS considered retaining the hearing process described in current regulations. Even though it is not adequately explained, the process itself is not without merit. However, after much discussion, that alternative was rejected in favor of the proposed regulation that moves responsibility for the hearings to the Office of Administrative Hearings (OAH). The proposed regulation also adopts a more formalized, mature and reliable hearing process.

#### ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The DGS has not identified any adverse impact or any alternatives that would lessen any adverse impact on small businesses.

## EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulations would not have any significant adverse economic impact on any business. While there are charges for the hearings conducted by the Administrative Law Judges, these are charges the DGS would absorb.

## EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable

## **12. §1896.22. Appeal Decisions**

### SPECIFIC PURPOSE OF THE REGULATION

Since other regulations set forth the rules governing appeals of small business certification denial, decertification, or the imposition by the DGS of sanctions, there must be a regulation stating what the authority of the ALJ is when hearing such appeals. This regulation does that.

Sanctions, although permitted by statute, are not addressed in the current regulations. However, since we have included the imposition of sanctions in these regulations, including appeals, the jurisdiction of the ALJ must be clearly established.

### NECESSITY

There is the necessity to clearly establish the authority of the ALJ so that all parties to the appeal know what the possible rulings might be. Knowing this information will assist them in preparing their appeal, or in the case of the state, rebutting an appeal. This is especially important since the current appeals process is being changed by these regulations.

### REASONS FOR MANDATING SPECIFIC ACTIONS OR PROCEDURES OR SPECIFIC TECHNOLOGIES OR EQUIPMENT

It is reasonable and necessary to set forth in this regulation the authority of the Administrative Law Judge when issuing decisions regarding appeals before the ALJ that were lodged under Section 1896.16 of these regulations. Since the issues at stake are certification and sanctions, the authority of the ALJ is limited to decisions directly affecting the certification decision (uphold or deny), whether or not sanctions should be imposed, and if imposed, what those sanctions should be. This way, all businesses know in advance exactly what the ALJ can rule on, and what issues are outside the scope of the ALJ's authority under this regulation.

## TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The DGS did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation.

## ALTERNATIVES TO THE REGULATION CONSIDERED BY THE AGENCY AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The DGS considered continuing the current practice of having appeals heard by a Hearing Officer appointed by the DGS Office of Legal Services, with decisions rendered in accordance with the regulations at Title 2, Division 2, Chapter 3, Subchapter 1.5, §§ 1195.4, 1195.5, and 1195.6. That alternative was rejected in favor of stating in this regulation the specific authority of the Administrative Law Judge so that it would be clear to all parties to an appeal.

## ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The DGS has not identified any adverse impact or any alternatives that would lessen any adverse impact on small businesses.

## EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulations would not have any significant adverse economic impact on any business. While there are charges for the hearings conducted by the Administrative Law Judges, these are charges the DGS would absorb.

## EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS – FOR ENVIRONMENTAL PROTECTION AGENCIES, THE RESOURCES AGENCIES OR THE OFFICE OF THE STATE FIRE MARSHALL

Not Applicable